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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

~~No. 665~~ 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, APPELLANT,

vs.

THE GLIDDEN COMPANY, MARSHALL WELLS COMPANY, BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED JANUARY 17, 1931

(35,587)

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State of Minnesota.
In Supreme Court.

1930.

STATE OF MINNESOTA, County of St. Louis. } DISTRICT COURT, Eleventh Judicial District.

THE GLIDDEN COMPANY, a Corporation; MARSHALL WELLS COMPANY, a Corporation; BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, a Minnesota State Banking Corporation, and JOSEPH SUPORNICK, Plaintiffs,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, MINNESOTA IMPLEMENT MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, and THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, All Corporations, Defendants.

SUMMONS.

The State of Minnesota to the above named defendants:

You and each of you are hereby summoned and required to answer the complaint of the plaintiffs in the above entitled action, a copy of which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint upon the subscribers, at their office, Room 1815, Pioneer building, city of St. Paul, Min-

[illegible] to be at a term [illegible]

[illegible] within twenty (20) days after the service of this summons upon you, exclusive of the day of such service, and if you fail to appear and answer said complaint within the time aforesaid, said plaintiffs will apply to the court for the relief demanded in the complaint.

KERR, NELSON, BURNS & MORAN,
1016 Pioneer Building,
St. Paul, Minnesota,
FEYBERGER, FULTON & DOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

(Title of Cause.)

COMPLAINT.

The plaintiffs herein, complaining of the above named defendants, allege:

I.

That at all of the times herein mentioned said plaintiff, The Gilfillan Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

II.

That at all of the times herein mentioned said plaintiff, Minnesota Wells Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

III.

That at all of the times herein mentioned said plaintiff, [illegible] and Savings Inst. of Duluth, Minn. was and still is a state banking corporation, duly organized, existing and carrying on business under and by virtue of the

[illegible] of the State of Minnesota, [illegible]
with its principal place of business at [illegible]
[illegible] Minnesota.

IV.

That at all of the times herein mentioned, said plaintiff, Joseph Superstein, was and still is a resident of the City of St. Paul, Minnesota.

V.

That at all of the times herein mentioned said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Minnesota, with its principal place of business at Minneapolis, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

That at all of the times herein mentioned said Minnesota Implement Mutual Fire Insurance Company of Minnesota was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at Owatonna, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

That at all of the times herein mentioned said The Hardware Dealers Mutual Fire Insurance Company of Wisconsin was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Wisconsin, with its principal place of business at Stevens Point, Wisconsin, and was and is engaged in the business of insuring property against loss or damage by fire, and was

10 and is duly authorized to and actually transacting said business within the state of Minnesota.

VI.

That the Siegel Hardware Company is and was at all of the times herein mentioned a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business and headquarters at Duluth, Minnesota, and was engaged in a general mercantile business at Duluth, Minnesota, and is hereinafter for brevity referred to as "The Insured."

VII.

11 That on or about May 2nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 2nd, 1928, at noon, to May 2nd, 1929, at noon, in the amount of $2,000.00, upon all property (except notes, bills of exchange, accounts, evidences of and securities of property of every kind, money, currency and bullion) usual and

12 necessary to The Insured's business; its own or held in trust or on commission, or on consignment or sold but not removed, or the property of others for which it may be legally liable in event of loss; wardrobe of employers and employees; The Insured's interest in improvements and betterments to the building itself; printed books, and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story, gravel and brick building, situated at Nos. 102-104 East Superior street and 104½ E. Superior street, and 101-103-105 East Michigan street, and 4-6 South First avenue East, Duluth,

platforms, streets, alleys, and [illegible] in or on premises situate [illegible] 100 feet thereof, which said policy was designated as No. A60794, and was in the standard form prescribed by the laws of the state of Minnesota.

VIII.

That on or about May 31st, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 31st, 1928, at noon, to May 31st, 1929, at noon, in the amount of $7,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61410, and was in the standard form prescribed by the laws of the state of Minnesota.

IX.

That on or about June 29th, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from June 29th, 1928, at noon, to June 29th, 1929, at noon, in the amount of $2,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61605, and was in the standard form prescribed by the laws of the state of Minnesota.

X.

That on or about July 5th, 1928, said defendant, The Re-

Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from July 5th, 1928, at noon, to July 5th, 1929, at noon, in the amount of $12,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61859, and was in the standard form prescribed by the laws of the state of Minnesota.

XI.

That on or about November 22nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The insured against loss or damage by fire for a period of one year from November 22nd, 1928, at noon, to November 22nd, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A63439, and was in the standard form prescribed by the laws of the state of Minnesota.

XII.

That on or about February 1st, 1929, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain

[illegible]

is the amount of $10,000.00, upon the property specifically described in paragraph VII hereof, which policy was known as No. [illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

XIII.

That on or about August 9th, 1928, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from September 1st, 1928, at noon, to September 1st, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. 22M-5456, and was in the standard form prescribed by the laws of the state of Minnesota.

XIV.

That on or about March [illegible]th, 1929, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from March 7th, 1929, at noon, to March 7th, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. [illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

Hardware Dealers Mutual Fire Insurance Company of Wisconsin, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from April 3rd, 1928, at noon, to April 3rd, 1929, at noon, in the amount of $9,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. H22-529, and was in the standard form prescribed by the laws of the state of Minnesota.

XVI.

That at all of said times all of the aforesaid policies, by their respective terms, permitted other or concurrent insurance, and at all times each of said policies provided for arbitration and contained a provision in words and figures following—that is to say:

"In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, disinterested and impartial appraisers who shall be residents of this state, the insured and this company each selecting one within fifteen days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time the other appraiser and the umpire selected, as herein provided may act as a board of appraisers and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided that if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the

District Court of the county wherein the loss occurs may appoint such as umpire upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within fifteen days after a statement of such loss has been rendered to the company, either party the assured or the company, shall have notified the other in writing that such party demands an appraisal; such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses for the appraisal and umpire. The fees of any appraiser or umpire shall in no case exceed ten dollars ($10.00) per day."

XVII.

That each of said policies provided for co-insurance and contained a co-insurance clause and provision in words and figures following—that is to say:

"In consideration of the acceptance by the insured of a reduction of the established rate of $..... to $....., it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least 80% of the actual cash value at the time of the loss, and that failing so to do, the insured shall, to the extent of such deficit bear his, her or their proportion of any loss, and it is expressly stipulated that in case there shall be more than one item or division in the form of this policy this clause shall apply to each and every item."

That as a matter of fact, The Insured did at all times

[illegible]

XVIII.

That all of the property covered and insured by the respective policies hereinbefore mentioned was at all of the times herein mentioned, and was at all of the dates at which said policies, and each of them, were issued, and continued so to be at all times down to and including the fire hereinafter set forth, the property of said owned by The Insured.

XIX.

That in and by each of the policies hereinbefore mentioned, it was provided that if there should be any other insurance on the property insured, whether prior or subsequent, The Insured should recover on said respective policies no greater proportion of loss, whether by fire, lightning, or both, except in case of total loss on buildings, sustained, than the sum in such respective policies, and so insured, bears to the whole amount insured thereon.

XX.

That on March 9th, 1929, and while said policies, and each of them, were in full force, a fire occurred on said premises by reason of which the property in said respective policies described was damaged, and certain thereof totally destroyed. That said loss and damage was in at least the sum of [illegible]

XXI.

[illegible]

Honorable the District Court of the Eleventh Judicial District, state of Minnesota, wherein said property was situated, for an order appointing and designating an umpire for the purpose of and to complete a board of appraisers in conformity with the laws of the state of Minnesota in such case made and provided, and thereupon and on or about said date last mentioned, The Insured caused to be served upon each of said defendants the said petition, and a motion based thereon, for an order appointing an umpire to complete the board of appraisers in said matter, which motion was by its terms made returnable before the above named court, at the court house, in the city of Duluth, county of St. Louis, state of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel could be heard, and which motion was by its terms based upon said petition and affidavit which was thereto attached, and was made for the reason and upon the ground that, within the time fixed thereby by law, the defendants, and each of them, had not named an appraiser so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

That thereupon and on said April 13th, 1929, at 9:30 o'clock A. M., at the court house, in the city of Duluth, St. Louis county, Minnesota, said motion was duly submitted to and argued before the Honorable Bert Fesler, presiding judge of said court, and said judge on said date duly made and entered his order appointing Thomas M. McCabe, of the city of Duluth, Minnesota, as umpire to make up said board of appraisers in said matter.

That all of said papers relative to the appointment of an umpire have been duly filed with the clerk of the above named court and became and are a record of said court, reference thereto for more particularity being hereby made.

That thereupon and on April 16th, 1929, notice of such appointment of an umpire was duly served upon said defendants, and each of them, at which time said defendants, and each of them, were notified in writing that the said umpire had designated April 19th, 1929, at 10:00 o'clock A. M., as the time, and the umpire's office, in the Torrey Building, in the city of Duluth, Minnesota, as the place for a meeting of the board of appraisers to hear evidence and consider and determine the matter of loss and damage, and to make their award thereon, all in pursuance to their duties as such board of appraisers.

XXV.

That thereupon, and after his appointment, and prior to said arbitration, said umpire duly qualified as such and accepted his appointment and, together with said Rodgers, swore in writing that he and they would act in strict impartiality in all matters of difference that should be submitted to them in connection with the appraisement, and that they would justly perform the duties and trust of umpire and appraiser, respectively, and would make true, just and conscientious award, according to the best of their ability.

XXVI.

That thereupon and at the time and place so designated, and on April 19th and 20th, 1929, the said appraisers and said umpire, after hearing evidence estimated and appraised the loss occasioned by said fire, and thereupon and on said April 20th, 1929, said appraiser Rodgers and said umpire McCabe made an award in writing, by the terms of which, and whereby they found and stated separately that the sound value of the stock of merchandise so damaged and destroyed immediately preceding said fire was $67,600.70, and that the loss and damage thereto occasioned by said fire was $61,600.70, and by the terms of which and whereby they

further found and stated separately that the sound value of the entire furniture and fixtures so damaged and destroyed immediately preceding said fire was $14,000.00, and that the loss and damage thereto occasioned by said fire was $13,364.15, thus making a total loss and damage occasioned by said fire of $74,964.91.

That thereupon and on April 22nd, 1920, written notice of such award, together with a certified copy of said appraisal and award, was duly sent to and served upon said defendants, and each of them.

XXVII.

That said defendants, and each of them, by their respective duly authorized adjusters, immediately after said fire, went to Duluth, Minnesota, proceeded to and did conduct a full and complete investigation of said fire and said loss, but notwithstanding the same, said defendants, and each of them, although being duly notified of all the steps incident to said arbitration and award, failed, neglected and refused to in any way participate therein.

XXVIII.

That more than sixty days have elapsed since the making of said award. That said plaintiffs have demanded and caused to be demanded of said defendants, and each of them, the payment of said award and their respective proportions thereof, but that said defendants, and each of them, have failed, neglected and refused to pay the same, or any part thereof.

XXIX.

That said The Insured and said plaintiffs have performed all the conditions and done all the acts required to be done by them, or either of them, by virtue of said policies, and each of them.

XXX.

That the amount of the liability of each defendant for such loss and award depends upon the liability of the other defendants, and that to adjudge the respective liabilities of the defendants it is necessary at the same time to determine the liability of each, and for this and other reasons, and to prevent a multiplicity of suits, it is necessary to join all of the defendants in this action. That each of said defendants has denied liability.

XXXI.

That The Insured, prior to the commencement of this action, for a good and valuable consideration, assigned, transferred and set over to the plaintiffs all its right, title and interest in and to its said fire loss hereinbefore referred to, and in and to its chose of action against said defendants, and each of them, by reason thereof, and said plaintiffs thereupon became and now are the owners and holders of said loss and chose in action, and entitled to sue thereon.

XXXII.

That by reason thereof, there is now due and owing said plaintiffs from said defendants the sum of $74,964.91, and that said plaintiffs have been damaged in said amount by reason of the premises.

Wherefore, said plaintiffs demand judgment, that said court, taking full and complete jurisdiction in the premises, will determine the liability of each of said defendants, respectively, to the plaintiffs, according to their (said plaintiffs) respective interests, and will order judgment against said defendants, respectively, in this action for such sum as each should respectively pay, in order that the plaintiffs may have and recover the full sum of $74,964.91, with interest thereon, together with their costs and disbursements

KERR, NELSON, BURNS & MOHAN,
1815 Pioneer Building,
St. Paul, Minnesota,
FRYBERGER, FULTON & BOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

(Duly verified.)

(Similar summons and complaint served on each defendant.)

(Title of Cause.)

SEPARATE ANSWER OF DEFENDANT, THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, one of the above named defendants, as and for its separate answer to the complaint of plaintiffs herein:

I.

1. Admits all and several the allegations set forth and contained in paragraphs numbered I to XVII, both inclusive, and also in paragraphs numbered XIX, XXII, XXIII, XXV, XXVI and XXX, of plaintiffs' complaint; with the exception of the words "thus making a total loss and damage occasioned by said fire of $74,001.01," occurring at the end of the first paragraph of subdivision XXVI of said complaint, defendant merely admitting in that respect that said loss, namely, $74,001.01, was the total appearing in and under said several

2. Admits that on March 3, 1929, a fire occurred on the premises described in its said several policies, resulting in

[illegible]

3. Admits that this defendant was duly notified of the loss and damage sustained by the insured under said policies, and that thereupon the insured, [illegible] Company (hereinafter referred to as the "insured"), filed upon request of this defendant sworn statements in proof of loss and proofs of loss, signed and sworn to by the insured.

4. Admits that on or about March 28, 1925, insured served upon this defendant a written demand for the arbitration provided for in defendant's said policies, and in said demand selected W. C. Rodgers as insured's appraiser. Admits that said W. C. Rodgers is and was at all of the times mentioned in said complaint a resident of St. Paul, Minnesota. Admits that at all times this defendant refused to appoint or select an appraiser in said arbitration proceedings and admits all and several the allegations contained in the fourth, fifth, sixth and seventh paragraphs of subdivision XXIV of plaintiffs' complaint, with the exception of the word "duly" wherever the same may occur in said last referred to paragraphs of said subdivision.

5. Admits that shortly after the occurrence of said fire this defendant made as full an investigation of said fire and said loss as it was able to do under the circumstances, and further admits that although it was notified of all steps taken incident to said arbitration up to the time of the hearing thereunder, this defendant refused to in any way participate therein, and further admits that this defendant has refused, and still refuses, to pay said plaintiffs or either thereof anything under or upon its said several policies, or under or upon said award.

6. Specifically denies that said insured and/or said plaintiffs, or either or any of the latter, have performed all

[illegible] all the acts required to be done by them, or either of them, by virtue of said policies and each thereof.

7. Further answering this defendant alleges that it has neither knowledge nor information sufficient to form a belief as to whether, prior to the commencement of this action, or at any other time, the insured, for a good and valuable consideration, assigned, transferred and set over to plaintiffs herein, or to either or any thereof, all the right, title and interest of said insured in and to said fire loss hereinabefore referred to, and/or in and to its chose of action against this defendant, by reason thereof; or as to whether or not said plaintiffs, or either or any thereof, thereupon became or now are the owners and holders of said loss and chose in action and entitled to sue thereon; and therefore denies the same and all thereof and puts plaintiffs and each thereof upon proof thereof.

8. Denies that there is now due and owing from this defendant to said plaintiffs, or to either or any thereof, any sum whatsoever.

9. Further answering this defendant denies each and every allegation, matter and thing in said complaint set forth and alleged, save and excepting such as are hereinbefore admitted, qualified, or specifically denied.

II.

10. Further answering, and as and for a first separate affirmative defense herein, defendant repeats and realleges as and several the allegations and matter hereinbefore and in paragraphs numbered 1 to 9, both inclusive, of this answer alleged and contained, and makes the same part hereof as though set forth herein in full.

11. Further answering this defendant alleges that each of the said policy contracts expressly provided that the same

to wit:

That subsequent to said fire said Insured with and for the sole express design and purpose of deceiving and defrauding this defendant, knowingly, wilfully, falsely and fraudulently materially misrepresented and over-valued to this defendant, by written statements, under oath and otherwise, the character, quantity and value of the properties described in the coverage clause of defendant's said policies, and knowingly, wilfully, fraudulently and falsely materially misrepresented and over-valued to this defendant, by written statements, under oath and otherwise, the amount of loss and/or damage sustained to said properties by reason of said fire; all for and with the sole intent and purpose of deceiving and defrauding this defendant and inducing it to pay said Insured a sum largely in excess of that for which this defendant was in anywise liable under its said policy contracts, or any or either thereof.

III.

13. Further answering, and as and for a second separate affirmative defense herein, defendant repeats and realleges all and several the allegations and matter hereinbefore set in paragraphs numbered 1 to 9, both inclusive, of this answer alleged and contained, and makes the same part hereof as though set forth herein in full.

14. Defendant further alleges that the award made and

rendered as aforesaid was wholly illegal and void in this, to-wit: That said award was grossly and materially excessive, in that the amount of loss and/or damage resulting from said fire to the several properties described in defendant's said policy contracts did not exceed the sum of $50,000.00.

IV.

15. Further answering, and as and for a third separate affirmative defense herein, defendant repeats and realleges all and several the allegations and matter hereinbefore and in paragraphs 1 to 9, both inclusive, of this answer alleged and contained, and makes the same a part hereof as though set forth herein in full.

16. Further answering defendant alleges that the arbitration and award alleged in the complaint herein were had under and pursuant to the provisions of the statutes of this state, imposing on all insurance companies doing business in the state the requirement of adopting the so-termed "Standard Form of Policy" prescribed by such statutes. That by the terms of such statutes one of the provisions thereof makes the submission by insurers to such arbitration compulsory, and makes compliance with and recognition of such compulsory arbitration a condition to the right to carry on and conduct the business of insurance in this state.

17. That the statutory conditions last stated prescribing such compulsory arbitration were and are unconstitutional and void as to this defendant, as violative of and contrary to Section 4 of Article I and Section 7 of Article I of the Constitution of this state.

18. That the proceedings of said arbitration and the award alleged and relied on in the complaint herein are illegal and void for the reasons hereinabove and in this separate defense stated.

20. That the statutory conditions hereinabove alleged in so far as the same prescribe compulsory arbitration were and are unconstitutional and void as to this defendant as violative of and contrary to the Fourteenth Amendment of the Constitution of the United States.

21. That the proceedings in said arbitration and the award alleged and relied on in the complaint are illegal and void for the reasons hereinabove and in this separate defense stated.

Wherefore, this defendant prays judgment that neither plaintiffs nor either thereof have and recover anything as against this defendant, and that this defendant have and recover its costs and disbursements herein incurred.

NATHAN H. CHASE and
M. H. BOUTELLE,
603 1st Nat'l Soo Line Bldg.,
Minneapolis, Minnesota,
Attorneys for Defendants.

(Duly verified.)

(Similar answers were interposed by each of the other two defendants.)

[illegible] OF DEFENDANT,
[illegible] DEALERS MUTUAL FIRE INSUR-
ANCE COMPANY OF WISCONSIN

And now come the plaintiffs in the above entitled action, and replying to the separate answer of the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, and each and every portion thereof, including the first, second, third and fourth separate affirmative defenses therein:

I.

Deny each and every allegation, matter and thing in said separate answer contained, save and except such portions thereof as admit the allegations of the complaint, and save as are hereinafter expressly stated, admitted or qualified.

II.

Admit the allegations contained in paragraph eleven of said answer.

III.

Admit that the arbitration and award alleged in the complaint were had under and pursuant to the provisions of the statutes of the state of Minnesota, and allege that said arbitration and award were also had under and pursuant to the provisions of the policy contract between the parties hereto.

Wherefore, said plaintiffs pray judgment as in their complaint demanded.

KERR, NELSON, BURNS & MOHAN,
1015 Pioneer Building,
St. Paul, Minnesota,
FEYBERGER, FULTON & BOTTLE,
712 Lumber Exchange Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

other two defendants.

(Title of Cause.)

SETTLED CASE.

The above entitled action came duly on for trial on December 2nd, 1926, before the Hon. Bert Fesler, and a jury. Harold C. Kerr, Esq., of Kerr, Nelson, Burns & Nelson, St. Paul, Minn., and Edward L. Boyle, Esq., of Freyberger, Watson & Boyle, Duluth, Minn., appeared on behalf of plaintiffs, and Messrs. Nathan H. Chase and M. H. Gardner, Minneapolis, Minn., appeared on behalf of defendants. A jury having been duly impanelled, the following proceedings were had:

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits A to I, inclusive, being the original policies involved in this case.

The Court: Received.

PLAINTIFFS' EXHIBIT A.

This is a fire insurance policy of defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, in the Minnesota Standard Form prescribed by and set forth in full in Section 3512 of the Gen. Stat. Minn. 1923, numbered A61866, running for a period of one year from noon on June 29th, 1922, until noon on June 29th, 1923, insuring Stuart Hardware Co. and its legal representatives against loss or damage by fire, in the sum of $2,000.00 and containing the following coverage clause or rider, viz.:

"Uniform Standard Minnesota Form No. [illegible]

(Edition Dec. 20)

On all property (except notes, bills of exchange,

accounts, evidences and securities of property of every kind, money, currency and bullion) usual and necessary to the assured's business; its own or held in trust or on commission, or on consignment, or sold but not removed, or the property of others for which it may be legally liable in event of loss, wardrobe of employers and employees; the assured's interest in improvements and betterments to the building itself; printed books and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story, gravel roof brick building situated at Nos. 102-104-104½ East Superior Street, and 101-103-105 East Michigan Street, and 4-6 South First Avenue East, Duluth, Minnesota, and on or under sidewalks, areaways, porches, platforms, streets, alleys, and/or in or on vehicles within 100 feet, thereof.

Other insurance permitted.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of retail hardware stores and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Co-Insurance Clause

In consideration of the acceptance by the insured of a reduction from the established rate of $1.49 to $1.267 it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least eighty per cent of the actual cash value at the time of the loss, and that failing so to do, the insured shall to the extent of such deficit bear his, her or

their proportion of any loss, and it is expressly stipulated that in case there shall be more than one item or division in the form of this policy this clause shall apply to each and every item.

This clause, at the request of the insured, is attached to and forms a part of Policy No. A61608 of the Retail Hardware Mutual Fire Ins. Co., issued at its Home Office Agency. Dated 6/29/28.

Siegel Hardware Co. J. B. Siegel Insured

Thos. J. McCracken Sec'y.

Notice: This clause must be signed by both insured and agent. A policy may contain a co-insurance clause only when the entire risk covered by the same amounts to $5,000 or more.

Note to Agents: Agents should caution the insured to see that the amount of insurance carried is equal to the percentage of value stated above, to avoid insured being a contributor under the policy in event of loss.

Waiver Of Inventory Or Appraisement Clause

If this policy shall be subject to the conditions of co-insurance, it is also made a condition that in the adjustment of any loss hereunder, provided same does not exceed 2% of the total insurance carried, it shall not be a part of compliance with the conditions of co-insurance to inventory and/or appraise the undamaged property.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

The Provisions Printed On The Back Of This Form Are Hereby Referred To And Made a Part Hereof.

Attached to and forming part of Policy No. A61608 of the Retail Hardware Mutual Fire Ins. Co., issued at its Home Office Agency. Dated 6/29/28.

Thos. J. McCracken Sec'y.

PLAINTIFFS' EXHIBITS B TO F.

These are policies of defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, identical in form and coverage with Plaintiffs' Exhibit A, all in force at the time of the fire, and totaling in amount $42,000.00.

PLAINTIFFS' EXHIBITS G TO H.

These are policies of defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, identical in form and coverage with Plaintiffs' Exhibit A, all in force at the time of the fire and totaling in amount $20,000.00.

PLAINTIFFS' EXHIBIT I.

This is a policy of defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, identical in form and coverage with Plaintiffs' Exhibit A, and in force at the time of the fire, in the amount of $9,000.00.

Mr. Kerr: Plaintiffs now offer in evidence Plaintiffs' Exhibits J to A-1.

Mr. Chase: It may be admitted that the sworn statements, represented by Plaintiffs' Exhibits J, L, N, P, R, T, V, W and X, together with the respective letters accompanying them, represented by Plaintiffs' Exhibits K, M, O, Q, S, U, Y, Z and A-1, were all and several received by the several defendants in this case, to whom they were addressed, in due course of mail, at or about the dates that those letters bear, viz., March 16th, 1923.

The Court: Plaintiffs' Exhibits J to A-1 received in evidence.

Plaintiff's Exhibit A is as follows:

"Sworn Statement

Policy No. A 60794 Amount of policy, $2,000.00

To The Retail Hardware Mutual Fire Insurance Company Of Minnesota:

By Your Policy Of Insurance No. A 60794, issued at your Minneapolis Agency, commencing the 2nd day of May, 1926, and expiring the 2nd day of May, 1929, at 12 o'clock noon, you insured Siegel Hardware Company, a corporation, against loss or damage by fire or lightning to the amount of Two Thousand Dollars according to the terms and conditions printed therein.

Siegel Hardware Company

$2,000.00 On all property (except notes, bills of exchange, accounts, evidences of any securities of property of every kind, money, currency and bullion) usual and necessary to the assured's Business; its own or held in trust or on commission, or on consignment or sold but not removed, or the property of others for which it may be legally liable in event of loss; wardrobe of employers and employees; the assured's interest in improvements and betterments to the building itself, printed books, and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story gravel roof, brick building, situated at Nos. 100-101 East Superior Street and 104½ E. Superior Street, and 101-103-105 East Michigan Street, and 4-6 South First Avenue East, Duluth, Minnesota, and on or under sidewalks, areaways,

[illegible] AGAINST LOSS BY FIRE, LIGHTNING AND TORNADO COMPANIES

porches, platforms, areaways, alleys and/or in or on vehicles within 100 feet thereof.

80% co-insurance clause attached.

The Value of the property insured under said policy, at the time immediately preceding the fire hereinafter mentioned was, as this affiant believes about Ninety Thousand Dollars.

The Interest of the insured in said property was as follows: sole owner.

All Other Insurance thereon was and is as follows:

(No. of policy)	(Date of Expiration of Policy)	(Name of Company)	(Amount of Policy)
A61859	July 5, 1929	The Retail Hardw. Mutual Fire Ins. Co...	$13,000.00
A61418	May 31, 1929	The Retail Hardw. Mutual Fire Ins. Co...	7,000.00
A61292	Feb. 1, 1930	The Retail Hardw. Mutual Fire Ins. Co...	10,000.00
A61003	June 29, 1929	The Retail Hardw. Mutual Fire Ins. Co...	9,000.00
A63489	Nov. 22, 1929	The Retail Hardw. Mutual Fire Ins. Co...	10,000.00
22M5456	Sep. 1, 1929	Minn. Implt. Mutual Fire Ins. Co.....	10,000.00
22M6318	Mar. 1, 1930	Minn. Implt. Mutual Fire Ins. Co.....	10,000.00
M 22528	Aprl. 1, 1929	Hardware Dealers Mutual Fire Ins. Co.	9,000.00

The Purposes for which, and the Persons by whom, the building insured, or containing the property insured, was occupied so far as known to this affiant, were as follows: Hardware Stores.

A fire occurred on the 9th day of March, 1930, about the

[illegible] by the [illegible] of the [illegible]

[illegible] of the [illegible] of [illegible], by which the property described in said policy was [illegible] or damaged, said fire originating, so far as known to the assured, [illegible] and no knowledge whatsoever with reference as to the origin of the fire.

Witness my hand at Duluth, this 16th day of March, 1920.

Siegel Hardware Company
By J. B. Siegel
Secretary and Assured.
Treasurer

State Of Minnesota)
) ss.
County of St. Louis)

Be It Remembered, that on the 16th day of March, 1920, personally appeared Joseph Siegel, who, being by me duly sworn, on oath did say that he is the same person who executed the foregoing statement—that he is a member of the firm, Siegel Hardware Co., of the corporation—which is the assured in the policy of insurance within described, and duly authorized to execute the foregoing statement—and the same is true.

Siegel Hardware Company
By J. B. Siegel
Secretary and Treasurer

Subscribed and sworn to before me this 16th day of March, 1920.

A. B. Clarfield
Albert B. Clarfield
Notary Public,
St. Louis County, Minn.

(Notarial Seal)

My Commission Expires May 13, 1923.

Plaintiffs' Exhibits L, N, P, R, T, V, W and X, are in similar form, representing "Sworn Statements" thus mailed to the several defendants, in connection with each of the policies thus issued by them.

PLAINTIFFS' EXHIBIT K.

Plaintiffs' Exhibit K is a letter accompanying the Sworn Statement, Plaintiffs' Exhibit J, and reads as follows:

"Albert B. Clarfield
Attorney at Law
407-408 First National Bank Bldg.,
Duluth, Minn.
March 16, 1929

The Retail Hardware Mutual
Fire Insurance Co. of Minn.
Minneapolis, Minnesota

In re: Policy No. A 60794
for $2,000.00, Siegel
Hardware Co. assured.

Gentlemen:

We are sending inclosed herewith sworn statement, notifying you of the fire that occurred March 9, 1929, by which the property described in said policy was destroyed and damaged.

Kindly acknowledge the receipt of the same.

Yours very truly,
By J. Supornick
J. Supornick
Adjustor for the Assured
Guaranty Building
St. Paul, Minnesota."

identical with Plaintiffs' Exhibit K, being letters to each of the foregoing referred to as sworn statements. Exhibits M, O, Q, Sand U are all addressed to Retail Hardware Mutual Fire Insurance Company of Minnesota, Minneapolis, Minnesota. Exhibits Y and Z are each addressed to Minnesota Implement Mutual Fire Insurance Company of Minnesota, Owatonna, Minnesota, and Exhibit A1 is addressed to Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Stevens Point, Wisconsin.

JOSEPH SUPORNICK,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Kerr:

I am 43 years of age, and reside in St. Paul, Minnesota, where I am engaged in the business of adjusting insurance losses for the policy holders; having been in that line of business 17 years last past.

After a policy holder has a fire loss he employs me as an adjustor to represent him in connection with the loss, in the matter of estimating the same, making an inventory, and notifying the companies of the kind of loss and approximately as to the value of the property involved, and adjusting the losses with the companies.

I acted as such adjustor for the Siegel Hardware Co. in connection with this loss that it sustained on March 9th, 1929; and am also one of the plaintiffs in this action. The defendant, Insurance Companies, also had adjustors representing them, one of whom was Charles Wright.

The letter, Plaintiffs' Exhibit B-1, was signed and mailed by me on or about the date it bears.

Mr. Chase: Admitted that Plaintiffs' Exhibit B-1 was re-

received by the parties to whom it was addressed, in due course of mail.

Plaintiffs' Exhibit B-1 offered and received in evidence without objection; reading as follows:

PLAINTIFFS' EXHIBIT B-1.

"Joseph Supornick
Adjuster for the
Insured
712-713 Guardian Building

Saint Paul, Minn.
March 26th, 1929.

Mr. C. G. Wright, Adjuster
for
Hardware Dealers Mutual Fire Ins. Co.,
and
Minnesota Implement Mutual Fire Ins. Co.,
and
Retail Hardware Mutual Fire Insurance Co.,
422 Providence Building,
Duluth, Minn.
Dear Sir:

Re: Loss—Seigal Hardware Company,
Duluth, Minnesota.

Since we are unable to agree with you as to the amount of loss and damage sustained to the stock, fixtures and debris of the above named assured, and insured in the policies mentioned herein, by fire, which occurred on March 9th, 1929, I hereby demand that the amount of said loss and damage be determined by appraisers, as provided by the terms and conditions of the policies, and hereby nominate and appoint as one of the appraisers to act in said matter, Mr. W. C. Rodgers, c/o N. W. Jobbers Credit Bureau, Endicott Building, St. Paul, Minn.

appraiser appointed by you.

Very truly yours,

Jos. Sapovich,

Adjuster for the Insured.

Witness: I was present in Duluth at the time of the appraisal proceedings, commencing on April 19th and finishing on April 20th, on which last day the award was rendered.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibit C-1, being the original motion and application for appointment of an umpire, taken from the files of the clerk of this court, with the affidavits of return of service thereon together with the clerk's stamp of filing.

Mr. Chase: Objected to on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT C-1.

State of Minnesota — District Court

County of St. Louis — Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation, Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company, a Corporation; Minnesota Implement Mutual Fire Insurance Company, a Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corporation, Respondents.

For the appointment of an umpire under and pursuant to Chapter 121 of the General Laws of the State of Minnesota for the year 1913, General Statutes 1913, Section 3818.

[illegible] Hardware Dealers Mutual Fire Insurance Company, a Corporation, Minnesota Implement Mutual Fire Insurance Company, a Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corp.:

You are hereby notified that the within and annexed Petition and Application will be submitted to and brought on for hearing before the presiding Judge of the above entitled Court at a special term thereof, appointed to be held at the Court House in the City of Duluth, County of St. Louis, State of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at which time and place a Motion will be made herein by and on behalf of the applicant for an order appointing an umpire to complete the board of appraisers mentioned and described in said petition according to the statute in such cases made and provided.

Said Motion will be based upon the annexed petition and application and for the reason and upon the ground that within the time allowed therefor by law, the respondents did not name an appraiser, so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

Kerr, Nelson, Burns & Mohan,
1615 Pioneer Building,
St. Paul, Minn.,
Attorneys for Applicant.

State of Minnesota
County of St. Louis

District Court
Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation,

Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company, a Cor-

For the appointment of an umpire under and pursuant to Chapter 421 of the General Laws of the State of Minnesota for the year 1913, General Statutes 1913 Section [illegible]

To The District Court In And For The County of St. Louis, State of Minnesota:

Your petitioner, Siegel Hardware Company, a Corporation, with its principal place of business in the City of Duluth, State of Minnesota, respectfully shows and states:

I.

That during all the time hereinafter mentioned, the Hardware Dealers Mutual Fire Insurance Company, the Minnesota Implement Mutual Fire Insurance Company and the Retail Hardware Mutual Fire Insurance Company of Minnesota, were Corporations duly licensed to transact the business of fire insurance within the State of Minnesota.

II.

That prior to the 9th day of March, 1929, said Insurance Companies did each insure the applicant under separate policies of fire insurance, written upon the Minnesota Standard form of fire insurance policy against loss and damage by fire to certain personal property consisting generally of a stock of hardware and sporting goods, also store fixtures and general equipment, all located and situated in its store building at 100-101 East Superior Street, in the City of Duluth, State of Minnesota, said personal property being then and there owned and held by the applicant.

III.

106 That said policies were in full force and effect on said day, 9th day of March, 1929, and that on said date a fire occurred, causing loss and damage under and within the provisions of said policies and each of them to the said personal property described in and covered thereby.

IV.

That following the date of the said loss and damage by fire, and on the 16th day of March, 1929, sworn statements were duly and regularly rendered to the Hardware Dealers Mutual Fire Insurance Company, the Minnesota Implement
107 Mutual Fire Insurance Company and the Retail Hardware Mutual Fire Insurance Company of Minnesota, in accordance with the terms and conditions of their said policies. That also on the 21st day of March, 1929, proofs of loss were duly and regularly rendered to the said Insurance Companies.

V.

That subsequent to the date of said fire, a disagreement between the said applicant and the said insurance companies, and each of them, arose as to the amount of the said loss and damage, and that your applicant did thereafter and on
108 the 26th day of March, 1929, in writing duly demand of said respondent, that the amount of said loss and damage be ascertained and determined by arbitration in accordance with the terms, provisions and conditions of the said policies, and each of them; that in and by said demand, W. C. Rodgers, Esq., of the City of St. Paul, County of Ramsey, State of Minnesota, was designated to act as an arbitrator or appraiser.

VI.

That since the said 26th day of March, 1929, and up to the present time, the fourth day of April, 1929, the respon-

and wholly failed to comply therewith by causing [illegible] praisers within the time limit prescribed by the laws of the State of Minnesota and the terms and conditions of said policies.

VII.

That your applicant is desirous of having such loss and damage appraised by a board of appraisers in accordance with the terms and conditions of said policies in such cases made and provided.

Wherefore, your applicant prays the Order of the Court appointing and designating an umpire for the purpose of and to complete a board of appraisers in the premises in conformity with Chapter 421 of the General Laws of the State of Minnesota, for the year 1913 (General Statutes 1913, Section 2318) and authorizing and directing the said board so completed to proceed with the appraisal of loss and damage suffered and sustained by applicant herein under said policies of fire insurance and for such other and further order as to the court shall seem just and proper.

Kerr, Nelson, Burns & Mohan,
Attorneys for Applicant.

State of Minnesota
ss.
County of Ramsey

Harold O. Kerr, being first duly sworn, deposes and says that he is the attorney for the applicant herein; that he has read the foregoing petition and knows the contents, and that the same is true of his own knowledge, and that the reason why he makes this verification is because applicant herein is not within the County of Ramsey.

Harold O. Kerr.

1928.

(Notarial Seal)

My Commission expires Feb. 22nd, 1931.

(Endorsed)

Filed in My Office At ... o'Clock ... M., Apr. 16, 1928.

P. Johnson, Clk. Dist. Court, By C. L. Weber, Deputy.

(Service on Hardware Dealers Mutual Fire Ins. Co. of Wisconsin, is admitted to have been duly made on Minnesota Insurance Commissioner, on April 6th, 1928.)

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibit D-1, taken from the same file.

Mr. Chase: Same objection.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT D-1.

State of Minnesota } District Court
County of St. Louis } Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation,

Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Minneapolis Implement Mutual Fire Insurance

[illegible] INSURANCE COMPANIES

[illegible] Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corporation,

Respondents.

Order.

The application of the above named Applicant for the appointment of an umpire to make up a board of appraisers provided for in the policies of insurance in the above entitled matter, duly came on for hearing before the undersigned in the Court House in the City of Duluth, State of Minnesota, said county, on the 13th day of April, 1929, applicant appearing by Thos. A. Galt, one of its attorneys, and the Court having heard the statements of counsel and being advised in the premises, it is hereby

Ordered, that Thomas M. McCabe, of the City of Duluth, State of Minnesota, be and hereby is appointed as Umpire to make up the board of appraisers hereinbefore referred to.

Dated this 13th day of April, 1929.

Bert Fesler,

Judge.

(Endorsed)

Filed In My Office At....o'clock...M., April 15, 1929. J. P. Johnson, Clk. Dist. Court. By G. L. Wedan, Deputy.

Mr. Chase: Receipt of Plaintiffs' Exhibits C-1 and D-1 admitted by defendants.

THOMAS M. McCABE,

sworn on behalf of plaintiffs

DIRECT EXAMINATION.

By Mr. Kerr:

I am the person who was appointed umpire in the arbitration proceedings between the Hogel brothers [illegible] Plaintiffs' Exhibits B-1, B-1, C-1 and D-1 are letters written by me to

Baker & Wright, my signatures being attached as Umpire to respective exhibits, all of which were written by me and mailed on April 16th, 1929.

Mr. Chase: Receipt of these letters in due course of mail by the several parties to whom they were addressed, is admitted.

Mr. Kerr: Plaintiffs' Exhibits E-1 to H-1, inclusive, are offered in evidence.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT E-1.

"Law Offices Of
Heitmann, McCabe, Gruber & Clare
Seventh Floor Torrey Building
Duluth, Minnesota

April 16, 1929

Retail Hardware Mutual Fire Insurance
Co. of Minn.
2344 Nicollet Avenue,
Minneapolis, Minn.

Re: Appraisal to determine the loss of
Siegel Hardware Company.

Gentlemen:—

The undersigned has been appointed Umpire of the Board of Appraisers to determine the loss in the above entitled matter.

You are hereby notified that the Board of Appraisers will meet for the purpose of receiving evidence and determining the loss in the above entitled matter and for such other matters as will properly come before it, at the office of the

[illegible] Terrey Building, at 10:00 o'clock A. M. [illegible] April 18, 1920. You are hereby notified of the said meeting and you are requested to appear if you desire to be heard in the said matter.

Very truly yours,

Thomas M. McCabe,

T. M. McCabe, duly appointed Umpire."

Exhibits F-1, G-1 and H-1 are identical with Plaintiffs' Exhibit E-1, being addressed to and received by, respectively, the other two defendants and Main, Baker & Wright.

Witness: The appraisal proceeding, referred to in the above exhibits, commenced at 10:00 o'clock A. M., on Friday, April 16th, 1920. Paper marked "Plaintiffs' Exhibit I-1" is the original award made in this appraisal proceeding, signed by Mr. Rodgers, in my presence, and myself, on the date it bears, viz., April 20th, 1920.

Mr. Kerr: Plaintiffs' Exhibit I-1 offered in evidence.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT I-1.

In the Matter of Appraisal proceeding by a Board of Appraisers consisting of W. C. Rodgers, selected by the insured as an appraiser and Thomas M. McCabe appointed by the Court as Umpire to determine the actual value of the stock of merchandise and store furniture and fixtures of the Siegel Hardware Company, Duluth, Minnesota, and the amount of loss and damage to said stock of merchandise and said store furniture and fixtures resulting from fire occurring March 2, 1920.

To [illegible] Insurance Companies [illegible]

Corporation, Minneapolis Implement Mutual Fire Insurance Company, a Corporation, and the Royal Hardware Mutual Fire Insurance Company of Minnesota, a Corporation, and Siegel Hardware Company, a Corporation of Duluth, Minn.

We, the undersigned, Thomas M. McCabe and W. [illegible] Rodgers, constituting a board of Appraisers in the above entitled matter, having given due notice to the parties concerned, of the time and the place of the sitting of said Board of Appraisers in the above entitled matter, for the purpose of estimating and appraising said loss and damage and actual value of said merchandise and said store furniture and fixtures preceding said fire and the said insured having in accordance therewith duly appeared before said board, and having presented evidence on all questions involved and after full and careful consideration of all of the evidence adduced as to said loss and damage and the actual damage of said stock of merchandise and said furniture and fixtures at the time when said loss and damage happened Do Hereby Find, Determine And Award the following:

That the actual value of the stock of merchandise located and contained on the premises 100-101 East Superior, Duluth, was the sum of $67,600.76.

That the loss and damage thereto occasioned by said fire is the sum of $61,600.76.

That the actual value of the store furniture and fixtures located and contained in the premises 100-101 East Superior Street, Duluth, Minn., was the sum of $14,000.00.

That the loss and damage thereto occasioned by said fire is the sum of $12,564.15.

In Testimony Whereof, we do hereby subscribe our names

at St. Paul, Minn., this 20th day of April, 1929.

Thomas M. McCabe, Umpire.
W. C. Rodgers, Appraiser.

Witness excused.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits J-1, K-1, L-1 and M-1, being letters dated and mailed on April 16th, 1921, by myself, and notifying the defendant companies and their adjustors of the appointment of the umpire by the District Court of St. Louis county, Minnesota, and of the hearing under the appraisement proceeding.

Mr. Chase: Subject to the objection that they are incompetent, irrelevant and immaterial, receipt of these respective exhibits is acknowledged in due course of mail, by the several defendants and their adjustors.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT J-1.

Kerr, Nelson, Burns And Mohan
Attorneys At Law
1014-15-16 Pioneer Building,
Saint Paul, Minnesota

April 16th, 1929.

Minnesota Implement Mutual Fire Insurance Company,
Owatonna, Minnesota.

In re Siegel Hardware Company.

Gentlemen:

We enclose and herewith serve upon you notice of order entered by Judge Fesler on the 13th inst., appointing Thomas M. McCabe of Duluth, as umpire to make up the Board of Appraisers in the above loss.

We understand that Mr. McCabe is today calling a meeting of the Board to take up the matter at his office in Du-

luth, Minnesota, on Friday, April 19th, 1929, at 10:00 o'clock A. M.

Yours very truly,
Kerr, Nelson, Burns & Mohan,
By: Kerr."

Plaintiffs' Exhibits K-1, L-1 and M-1 are letters of similar tenor to Exhibit J-1, addressed to and received by, respectively, the other two defendants and the adjustors, Main, Baker & Wright.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits N-1, O-1 and P-1, being letters written by me to the respective defendant companies, dated April 22nd, 1929, advising them of the award, and enclosing a copy of the award.

Mr Chase: Subject to the objection that they are incompetent, irrelevant and immaterial, it is admitted that the several defendants received these letters, and the accompanying copies of the award, in due course of mail; and that Main, Baker & Wright received similar letter and copy of award.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT N-1.

"Kerr, Nelson, Burns And Mohan
Attorneys At Law
1614-15-16 Pioneer Building,
Saint Paul, Minnesota

April 22nd, 1929.

Hardware Dealers Mutual Fire
Insurance Company of Wisconsin,
Stevens Point, Wisconsin.

In re Siegel Hardware Company:

Gentlemen:

This is to advise you that the Board of Appraisers, con-

[illegible] Insurance Company

[illegible] of W. C. Hodges, appraiser for the insured, and Thomas M. McCabe, umpire appointed by the District Court, Eleventh Judicial District, completed their appraisal in the above matter on the 20th inst., and made the following determination and award:

Actual value of stock of merchandise..... $67,500.7
Loss and damage thereto..... 51,000.7
Actual value of store furniture and fixtures..... 14,000.0
Loss and damage thereto..... 13,564.1

We enclose and herewith serve upon you a certified copy of the appraisal and award, which is self-explanatory.

We are attorneys for the assured and hereby demand from you the payment of the loss and damage to the merchandise and fixtures as found and awarded by the appraisers.

Yours very truly,

Kerr, Nelson, Burns & Mohan

By: Kerr.2

Plaintiffs' Exhibits O-1 and P-1 are identical with Plaintiffs' Exhibit N-1, and each of said three letters was accompanied by a copy of the award, which is set forth in Plaintiffs' Exhibit I-1.

JOHN SIEGEL,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Kerr:

I reside in Duluth, Minnesota, and am a stockholder and officer of Siegel Hardware Company, that sustained this fire loss on March 9th, 1922. I have examined documents marked Plaintiffs' Exhibits Q-1 to Y-1, inclusive, and that is my signature attached to each one of them. I signed these instruments, and each thereof, on behalf of the Siegel Hard

gave them to Mr. Supornick, one of the assignees.

Mr. Chase: It is stipulated that Plaintiffs' Exhibits Q-1 to Y-1, inclusive, were received in due course of mail by the respective defendants, and they may be received without objection.

Mr. Kerr: Plaintiffs' Exhibits Q-1 to Y-1, inclusive, offered in evidence.

PLAINTIFFS' EXHIBIT Q-1.

State of Minnesota

ss.

County of Ramsey

In consideration of one dollar cash in hand paid this day I do hereby transfer, set over and assign to Glidden Paint Company and Joseph Supornick all my right, title and interest in a certain fire loss of March 9th, 1929, at 3:30 P. M., on property covered by Policy No. A 64282 Retail Hardware Mut. Fire Ins. Co., located Minnesota, and I do by these presents further appoint, authorize and empower the said Glidden Paint Company and Joseph Supornick in my name, and for me to sign, any and all my proofs of loss on said fire and to sign receipt and endorse in my name for all drafts on said loss and I do forever hereby discharge the said Retail Hardware Mutual Fire Insurance Company from any claims whatsoever on my part as far as this loss is concerned, and do authorize them to pay said loss to Glidden Paint Company and Joseph Supornick and accept my signature made by them as Attorneys in Fact by this Power of Attorney.

It is hereby understood and agreed that this assignment covers this fire loss only and not the policy itself.

Given under my hand and seal this 8th day of May, 1929,
142 in the City of St. Paul, Minnesota.

Witnesseth: Siegel Hardware Co., Assured,
Joseph W. Lindeke By John Siegel, Pres.

Personally appeared John Siegel, signor of the foregoing instrument, who made solemn oath to the truth of the same and that no material fact is withheld that the said Company should be advised of.

Subscribed and sworn to before me the day and date above written.

Irving Lampert
143 Irving Lampert
(Notarial Seal) Notary Public,
Ramsey County, Minn.

My commission expires July 5, 1935.

Plaintiffs' Exhibits R-1, S-1, T-1, U-1, V-1, W-1, X-1 and Y-1, are of similar tenor, as each refer to one of the policies of defendants outstanding at the time of the fire.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits Z-1, A-2 and B-2, being letters mailed on May 14th, 1929, to each of the defendants, advising them of the foregoing assignments to Supornick and the Glidden Paint Company, and enclosing duplicate originals of such assignments.

144 Mr. Chase: No objection, and receipt thereof by the several defendants admitted.

PLAINTIFFS' EXHIBIT Z-1.

Kerr, Nelson, Burns And Mohan
Attorneys At Law
1614-15-16 Pioneer Building
Saint Paul, Minnesota

May 14th, 1929.

Retail Hardware Mutual Fire Insurance
Company of Minnesota,
2344 Nicollet Avenue,
Minneapolis, Minnesota.
Gentlemen:

In re: Siegel Hardware Company Fire Loss—
Policies Nos. A-61608, A-60794, A-61359,
A-61410, A-64292 and A-63439:

The interest of the Siegel Hardware Company, arising by virtue of its recent fire loss, has been assigned to the Glidden Paint Company and Joseph Suporsick, of this City, and we enclose and herewith serve upon you original assignment, which is self-explanatory.

We are the attorneys for the assignees, as well as for the Siegel Hardware Company, and in the future you will kindly take up with us any matters that may arise in regard to this fire loss.

Yours very truly,
Kerr, Nelson, Burns & Mohan,
By: Kerr."

Plaintiffs' Exhibits A-2 and B-2 are of similar tenor, addressed to and received by the other two defendants.

Witness: Siegel Hardware Company, a corporation, was owner of the property destroyed and damaged by the fire in question.

JAY E. MARKLE,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Boyle:

I reside in Duluth, Minnesota, and am cashier of the Bank of Commerce and Savings, having been connected with that bank for six years. The Siegel Hardware Company is a

customer of our bank, and after the fire of March 9th, 192
the bank received from Siegel Hardware Company the doc
ment you have handed to me, marked Plaintiffs' Exhibit C-
The signatures thereto are those of John Siegel and J.
Siegel. I am acquainted with these signatures as they a
customers of our bank. Later on the bank received fro
Siegel Hardware Company another document, which ha
been marked Plaintiffs' Exhibit D-2, which bears the signa
ture of Joe Siegel.

HARVEY D. SEDGWICK,

149 sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Boyle:

I reside in Duluth, Minnesota, and am employed by
Marshall-Wells Company, wholesale hardware, as treasure
and credit manager, which positions I have held for approxi
mately 25 years. At the time of the fire, on March 9th, 192
Siegel Hardware Company was a customer of the Marshal
Wells Company, and indebted to us. Shortly after the fir
we received from Siegel Hardware Company the paper yo
have handed to me, marked Plaintiffs' Exhibit E-2, and
150 made copies of this Plaintiffs' Exhibit E-2, and mailed on
to each of the defendant Insurance Companies, and to Mah
Baker & Wright, said copies being documents handed to m
marked, respectively, Plaintiffs' Exhibits F-2, G-2 and H-
At the same time I wrote each defendant company, an
Mahl, Baker & Wright a letter, said letters being document
handed to me, marked, respectively, Plaintiffs' Exhibits I
to I-2, inclusive.

Mr. Chase: It is admitted that the several letters a
documents accompanying them were received in due cours
of mail, by the several parties to whom they were addressed

Mr. Boyle: Plaintiffs offer in evidence Plaintiffs' Exhibit C-2.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial, being nothing more or less than an offer, there being no evidence of any acceptance on the part of the defendants.

Mr. Boyle: With Plaintiffs' Exhibit C-2 we will offer Plaintiffs' Exhibit D-2. We will offer them together if there is any question about it. E-2, F-2, G-2 and H-2 are all the same as C-2, being duplicate originals; E-2 being the one in the files of the Marshall Wells Company, C-2 being the one in the files of the bank, and F-2, G-2 and H-2 being the ones in possession of the Insurance Companies.

Mr. Chase: Same objection made to them as was made to Plaintiffs' Exhibit C-2.

Mr. Boyle: C-2 is the first exhibit that has been referred to, together with Plaintiffs' Exhibit D-2.

The Court: I understand counsel for plaintiffs is desirous of offering two papers, as constituting in themselves a complete exhibit.

Mr. Bontelle: It does not seem proper to offer each separately and jointly. Exhibit C-2 is merely an order by the insured to the insurers to pay a certain sum, and, not having been accepted, has no legal effect in law. There is a separate objection to Exhibit D-2 because in matter of time, at the time this second instrument was made out, the entire cause of action had already been assigned under the exhibits that have already been received in evidence in this case. In other words, the exhibits in evidence here, offered on behalf of plaintiffs, are outright assignments antedating Exhibit D-2; consequently, if those were valid there was nothing left for the Siegel Hardware Company to assign under Exhibit

154 at the time that instrument was executed, whatever that may be.

Now, as far as Exhibit C-2 is concerned, I have already stated our position. These matters are important as they go to the competency of the parties to those instruments as parties plaintiff in this case; whether they have any standing as such, or not.

Mr. Boyle: I will ask witness for the letters that the Marshall Wells Company afterwards received from the defendant, Insurance Companies.

Witness: Documents marked Plaintiffs' Exhibits M-2, N-2 and O-2, are letters that came to Marshall Wells Company in due course of mail in answer to our letters, I-2, J-2 and K-2; I do not recall that we received any answer from Main, Baker & Wright.

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Mr. Boyle: We now offer in evidence Plaintiffs' Exhibits I-2, J-2, K-2, L-2, M-2, N-2 and O-2.

Mr. Chase: Plaintiffs' Exhibits M-2, N-2 and O-2 are objected to as incompetent, irrelevant and immaterial, and the same objection to Plaintiffs' Exhibits I-2, J-2, K-2 and L-2.

The Court: I think I understand the point that is made by counsel, but do not know as I understand the law with reference to it.

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Here followed argument by respective counsel.

The Court: The best I can say about the point now, Gentlemen, is, if it is good, it is good at any point of the case. We will not take the time now to dispose of it further than to overrule the objection as to the exhibits, and let the record stand that way.

Mr. Chase: Exception.

PLAINTIFFS' EXHIBIT C-2

Duluth, Minnesota,
March 20, 1922

To The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, The Retail Hardware Mutual Fire Insurance Company of Minnesota, Minnesota Implement Mutual Fire Insurance Company:

Gentlemen:

You are hereby requested and ordered to pay to Marshall Wells Company $11,800.00 and to the Bank of Commerce & Savings, Inc., of Duluth $13,500.00 out of the moneys due or to accrue to the Siegel Hardware Company upon the company's insurance policies, for loss upon its stock of goods and fixtures at 102-104 East Superior Street in the City of Duluth, and charge the same to the Siegel Hardware Company; and the Siegel Hardware Company does hereby assign and set over unto said Marshall Wells Company the sum of $11,800.00 and to said Bank of Commerce & Savings, Inc., the sum of $13,500.00 out of said moneys due or to accrue upon said insurance policies.

Siegel Hardware Company
By John Siegel
Its President
J. B. Siegel
Its Secretary.

Witnesses:
H. C. Fulton
A. B. Croupeid.

Plaintiffs' Exhibits E-2, F-2, G-2 and H-2 are identical in form with Plaintiffs' Exhibit C-2.

PLAINTIFFS' EXHIBIT I-2.

"March 20th, 1922.

The Hardware Dealers Mutual
Fire Insurance Co. of Wisconsin,
Stevens Point, Wisconsin.

Gentlemen:

We hand you herewith order and assignment from Siegel Hdwe. Co., Duluth, Minnesota, in the amount of $25,300.00 payable to order of Marshall-Wells Co., $11,800.00, and Bank of Commerce & Savings, Inc., $13,500.00, said funds to be paid to the above order from moneys to accrue to the said Siegel Hdwe. Co. under policies on recent fire loss.

Kindly acknowledge receipt of said assignment and order using the enclosed envelope for that purpose.

Yours truly,

Marshall-Wells Company,

Credit Department."

Plaintiffs' Exhibits J-2, K-2 and L-2 are identical with Plaintiffs' Exhibit I-2, being similar letters sent to the other two defendants, and to Main, Baker & Wright.

PLAINTIFFS' EXHIBIT D-2.

"In Consideration of One Dollar ($1.00) to Siegel Hardware Company in hand paid by Bank of Commerce & Savings and by Marshall-Wells Company, the receipt whereof is hereby acknowledged, Siegel Hardware Company does hereby assign, sell and set over to Marshall-Wells Company Eleven Thousand Eight Hundred ($11,800.00) Dollars and to the Bank of Commerce & Savings, Inc., of Duluth, Thirteen Thousand Five Hundred ($13,500.00) Dollars out of the moneys due or to accrue to the Siegel Hardware Company upon the company's insurance policies for loss upon

Fire Insurance Company of Wisconsin, the Retail Hardware Mutual Fire Insurance Company of Minnesota, Minnesota Implement Mutual Fire Insurance Company. This assignment is given by virtue of indebtedness which is and was owing by the undersigned at the time of the fire to the assignees herein, in the above amounts.

June 26th, 1929. — Siegel Hardware Company,
By J. B. Siegel."

PLAINTIFFS' EXHIBIT M-2.

"Hardware Dealers Mutual
Fire Insurance
Company
Stevens Point, Wisconsin

March 22, 1929.

Marshall-Wells Company
Duluth, Minnesota
Mr: S. D. Carrier, Credit Department

We acknowledge receipt of order and assignment from Siegel Hardware Company, Duluth, to yourselves and the Bank of Commerce and Savings, Inc.

We are forwarding this document on to our Minneapolis Office who have the matter of payment at hand, and they will bear it in mind in considering any remittance to these assureds.

Yours very truly,
Hardware Dealers Mutual Fire Ins. Co.
F. J. Pfiffner,
Superintendent of Losses."

166 PLAINTIFFS' EXHIBIT N-2.

"Retail Hardwa[illegible]
Mutual Fire Insurance Co.
of Minnesota.
Nicollet Avenue at 24th Street,
Minneapolis, Minn.

March 21, 1929.

Marshall-Wells Company
Duluth, Minn.
Attn: S. R. Carrier

Loss: Siegel Hardware Co.
167 Duluth, Minn.

Gentlemen:

This will acknowledge receipt of yours of March 20 in which you enclose assignment of claim from Siegel Hardware Company in the amount of $11,800.00 to the Marshall-Wells Company and $13,500.00 to the Bank of Commerce & Savings, Duluth.

This loss has not as yet been adjusted, but when it is we will be very glad to respect your claim.

Yours very truly,
168 A. H. Cheese
Assistant Secretary."

PLAINTIFFS' EXHIBIT O-2.

"Minnesota Implement Mutual
Fire Insurance Company
Owatonna, Minnesota

March 22, 1929

In reply refer to claim No. 14851

Marshall-Wells Company
Dulpth, Minnesota

Re Loss: Siegel Hardware Co.
Duluth, Minnesota

Gentlemen:

This will acknowledge receipt of your letter of March 20 inclosing an order from the Siegel Hardware Company to pay said sums of money to yourselves and to the Bank of Commerce & Savings, Inc., said sums to be deducted from any proceeds that may be due the assured under our policy.

Very truly yours,

Geo. J. Christensen

Geo. J. Christensen

135-251"

Mr. Boyle: The plaintiffs rest.

Mr. Boutelle: The defendants rest.

Mr. Boutelle: The defendants now severally move for a directed verdict, on the ground that the plaintiffs have failed to establish a cause of action.

The basis of these motions is that this action proceeds upon an award had under the compulsory arbitration statute of the state of Minnesota, that the statute is unconstitutional and violative of Sections 4 and 7 of Article I of the State Constitution, and, similarly violative of the Fourteenth Amendment of the Constitution of the United States, as contravening the due process of law, the right or liberty of contract, and the equal protection clause of that amendment.

Mr. Kerr: The plaintiffs move for a directed verdict on the ground that there is no evidence on defendants' part constituting a defense.

The Court: The motion of defendants is denied. The motion of plaintiffs is granted. The record may show that the defendants have an exception to each ruling.

The Court: Ladies and Gentlemen of the Jury: This case

has proceeded to the point where it will be disposed of on the question of law. Under the forms that we have to use in this kind of a situation, the jury returns a verdict under direction of the court. I will appoint Mr. Halenbeck as foreman of the jury and will ask him to step up and sign this as foreman.

Mr. Halenbeck did as instructed by the court, and the following verdict, having been thus signed, and read by the court, was then read by the clerk:

VERDICT.

We, the jury in the above entitled action, find a verdict in favor of the plaintiffs, under the direction of the court, and assess their damages at the sum of seventy-seven thousand and one dollar and forty-six cents ($77,001.46).

Dated at Duluth, Minnesota, this second day of December, A. D. 1929.

HENRY HALENBECK,
Foreman.

CERTIFICATE.

I hereby certify that the foregoing case has been examined by me and found conformable to the truth, and to contain all of the evidence, and, either set forth in full or by appropriate and sufficient reference thereto, all of the exhibits offered and received in evidence on the trial of said action, together with all objections, rulings, orders, and all other proceedings on said trial; and I hereby settle and allow the same as the settled case therein.

Dated January 11th, 1930.

BERT FESLER,
District Judge.

(Title of Cause.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action, being regularly upon the calendar of the above named court for the November, A. D. 1929, general term thereof, came on for trial before the court and a jury at the court house in the city of Duluth, Minnesota, on the 2nd day of December, A. D. 1929, the plaintiffs appearing by their attorneys, Kerr, Nelson, Burns & Mollet, of St. Paul, Minnesota, and Fryberger, Fulton & Boyle, of Duluth, Minnesota, and the defendants appearing by their attorneys, Nathan H. Chase and M. H. Boutelle, of Minneapolis, Minnesota:

The court had, prior to the date of said trial, to-wit: On September 9th, 1929, made and filed herein an order as follows, to-wit:

That all issues made by the pleadings in said action be tried to a jury, with the exception of the issue as to the amount of liability of each of the defendants and as to said issue the court will determine the amount of liability, if any, of each defendant, such question being one of computation or mathematics.

At the close of the testimony in said action, the jury, under the direction of the court, returned a verdict in favor of the plaintiffs and against the defendants for the sum of $77,001.46.

The court having heard the evidence adduced at said trial and being fully advised in the premises and upon the verdict of the jury herein and all the files and records in this cause does hereby make and file the following findings of fact and conclusions of law and order for judgment:

FINDINGS OF FACT.

178 As facts the court finds:

1. That at all of the times herein mentioned said plaintiff, The Glidden Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

2. That at all of the times herein mentioned said plaintiff, Marshall Wells Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

3. That at all of the times herein mentioned said plain-
179 tiff, Bank of Commerce and Savings, Inc., of Duluth, Minnesota, was and still is a state banking organization, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, and actually conducting a state banking institution at Duluth, Minnesota.

4. That at all of the times herein mentioned, said plaintiff, Joseph Supornick, was and still is a resident of the city of St. Paul, Minnesota.

5. That at all of the times herein mentioned the defendant, the Retail Hardware Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized,
180 created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at Minneapolis, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

6. That at all of the times herein mentioned the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at

Owatonna, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

7. That at all of the times herein mentioned the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Wisconsin, with its principal place of business at Stevens Point, Wisconsin, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

8. That the Siegel Hardware Company is and was at all of the times herein mentioned a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business and headquarters at Duluth, Minnesota, and was engaged in a general mercantile business at Duluth, Minnesota, and is hereinafter for brevity referred to as "The Insured."

9. That on or about May 2nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 2nd, 1928, at noon, to May 2nd, 1929, at noon, in the amount of $2,000.00, upon all property (except notes, bills of exchange, accounts, evidences of and securities of property of every kind, money, currency and bullion) usual and necessary to The Insured's business; its own or held in trust or on commission, or on consignment or sold but not re-

year from June 5th, 1928, at noon, to June 5th, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A61[illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

12. That on or about July 5th, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from July 5th, 1928, at noon, to July 5th, 1929, at noon, in the amount of $13,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A61858, and was in the standard form prescribed by the laws of the state of Minnesota.

13. That on or about November 22nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from November 22nd, 1928, at noon, to November 22nd, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A62439, and was in the standard form prescribed by the laws of the state of Minnesota.

14. That on or about February 1st, 1929, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consid-

eration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from February 1st, 1929, at noon, to February 1st, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A64292, and was in the standard form prescribed by the laws of the state of Minnesota.

15. That on or about August 9th, 1928, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from September 1st, 1928, at noon, to September 1st, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. 22M-5456, and was in the standard form prescribed by the laws of the state of Minnesota.

16. That on or about March 7th, 1929, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from March 7th, 1929, at noon, to March 7th, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. 22M-6318, and was in the standard form prescribed by the laws of the state of Minnesota.

17. That on or about April 3rd, 1928, said defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from April 3rd, 1928, at noon, to April 3rd, 1929, at noon, in the amount of $9,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. H22-529, and was in the standard form prescribed by the laws of the state of Minnesota. 194

18. That at all of said times all of the aforesaid policies, by their respective terms, permitted other or concurrent insurance, and at all times each of said policies provided for arbitration and contained a provision in words and figures following, that is to say:

"In case of loss, except in case of total loss on buildings, under this policy, and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, disinterested and impartial appraisers who shall be residents of this st[illegible] the insured and this company each 195
selecting one within [illegible]een days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time the other appraiser and the umpire selected, as herein provided may act as a board of appraisers and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided, that if after [illegible] days the two appraisers cannot agree on such an umpire, the presiding judge of the District

[illegible] appraisal [illegible] the loss, [illegible] each appraiser [illegible] application of either party in writing [illegible] days' notice thereof in writing to the other [illegible] Failure within fifteen days after a statement of such [illegible] has been rendered to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses for the appraisal and umpire. The fees of any appraiser or umpire shall in no case exceed ten dollars ($10.00) per day."

19. That each of said policies provided for co-insurance and contained a co-insurance clause and provision in words and figures following, that is to say:

"In consideration of the acceptance by the insured of a reduction of the cash fixed rate of $..... to $....., it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least 80% of the actual cash value at the time of the loss, and that failing so to do, the insured shall to the extent of such deficiency bear his, her or their proportion of any loss, and it is expressly stipulated that in [illegible] division in the form of this policy this clause shall apply to each and every item."

[illegible] at all times [illegible] during the life of [illegible] insured, to

time of the loss.

20. That all of the property insured [illegible] respective policies hereinbefore mentioned, [illegible] times herein mentioned, and [illegible] said policies, and each of them, were [illegible] be at all times down to and including the [illegible] set forth, the property of and owned by The Insured.

21. That in and by each of the policies hereinbefore mentioned, it was provided that if there should be any other insurance on the property insured, whether prior or subsequent, The Insured should recover on said respective policies no greater proportion of loss, whether by fire, lightning, or both, except in case of total loss on buildings, [illegible] than the sum in such respective policies, and so insured, bears to the whole amount insured thereon.

22. That on March 9th, 1929, and while said policies, and each of them, were in full force, a fire occurred on said premises by reason of which the property in said respective policies described was damaged, and certain thereof totally destroyed.

23. That immediately after said fire said defendants, and each of them, were given notice thereof, and notice of the consequent loss thereunder, and thereupon The Insured, on March 16th, 1929, rendered to said defendants, and each of them, sworn statements in writing and proofs of loss, signed and sworn to by The Insured, setting forth all the facts relating to said policies, and each of them, and in accordance therewith, and in accordance with the laws of the state of Minnesota then in force.

24. That The Insured, at the time of said fire, had an insurance upon said property so damaged and destroyed, [illegible] as is hereinbefore set forth.

25. That The Insured and said defendants have failed to agree as to the amount of loss and damage sustained by virtue of said fire.

26. That by reason of the disagreement between the defendants and The Insured as to the amount of loss and damage and in accordance with the arbitration clause contained in each of said defendants' policies, as aforesaid, and in accordance with the laws of the state of Minnesota in such case made and provided, The Insured on March 26th, 1929, served upon said defendants, and each of them, a written demand for arbitration, and in said demand selected W. C. Rodgers as its appraiser.

That said W. C. Rodgers is and was at all of the times herein mentioned a resident of St. Paul, Minnesota, and is and was a competent, disinterested and impartial appraiser.

That said defendants, and each of them, failed, neglected and refused to appoint or select an appraiser in said arbitration proceedings to represent their respective interests, or otherwise, within fifteen days after a statement of The Insured's loss had been rendered to the respective companies, or otherwise, or at all.

That thereupon, and on failure of said defendants, and each of them, to appoint or select an appraiser as aforesaid, The Insured, on April 4th, 1929, petitioned the Honorable The District Court of the Eleventh Judicial District, state of Minnesota, wherein said property was situated, for an order appointing and designating an umpire for the purpose of and to complete a board of appraisers in conformity with the provisions of said insurance policies and the laws of the state of Minnesota in such case made and provided, and thereupon and on said date last mentioned, The Insured caused to be served upon each of said defendants the said

petition, and a motion based thereon, for an order appointing an umpire to complete the board of appraisers in said matter, which motion was by its terms made returnable before the above named court, at the court house, in the city of Duluth, county of St. Louis, state of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel could be heard, and which motion was by its terms based upon said petition and affidavit which was thereto attached, and was made for the reason and upon the ground that, within the time fixed thereby by law and the provisions of said insurance policies, the defendants, and each of them, had not named an appraiser so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

That thereupon and on said April 13th, 1929, at 9:30 o'clock A. M., at the court house, in the city of Duluth, St. Louis county, Minnesota, said motion was duly submitted to and argued before the undersigned presiding judge of said court, and said judge, on said date, duly made and entered his order appointing Thomas M. McCabe, of the city of Duluth, Minnesota, as umpire to make up said board of appraisers in said matter.

That all of the papers relative to the appointment of an umpire were duly filed with the clerk of the above named court and became and are a record of said court.

That thereupon and on April 16th, 1929, written notice of such appointment of an umpire was duly served upon said defendants, and each of them, at which time said defendants, and each of them, were notified in writing that the said umpire had designated April 19th, 1929, at 10:00 A. M., as the time, and the umpire's office in the Torrey Building, in the city of Duluth, Minnesota, as the place for a meeting of the board of appraisers to hear evidence and consider and

determine the matter of loss and damage, and to make their award thereon, all in pursuance to their duties as such board of appraisers.

27. That thereupon, and after his appointment, and prior to said arbitration, said umpire duly qualified as such and accepted his said appointment and, together with said Rodgers, swore in writing that he and they would act in strict impartiality in all matters of difference that should be submitted to them in connection with the appraisement, and that they would justly perform the duties and trust of umpire and appraiser, respectively, and would make true, just and conscientious award, according to the best of their ability.

28. That thereupon and at the time and place so designated, and on April 19th and 20th, 1929, the said appraiser and said umpire, after examining the burned premises and the remains of the property damaged and destroyed and after hearing evidence, estimated and appraised the loss occasioned by said fire, and, thereupon and on said April 20th, 1929, said appraiser Rodgers and said umpire McCabe made an award in writing, by the terms of which, and whereby they found and stated separately that the sound value of the stock of merchandise so damaged and destroyed immediately preceding said fire was $67,600.76, and that the loss and damage thereto occasioned by said fire was $61,600.76, and by the terms of which and whereby they further found and stated separately that the sound value of the entire furniture and fixtures so damaged and destroyed immediately preceding said fire was $14,000.00, and that the loss and damage thereto occasioned by said fire was $13,364.15, thus making a total loss and damage occasioned by said fire of $74,964.91.

That thereupon and on April 22nd, 1929, written notice of such award, together with a certified copy of said ap-

praisal and award, was duly sent to [illegible] defendants, and each of them.

29. That said defendants, and each of them, by their respective duly authorized adjusters, immediately after said fire went to Duluth, Minnesota, proceeded to and did conduct a full and complete investigation of said fire and said loss, but notwithstanding the same, said defendants, and each of them, although being duly notified of all the steps incident to said arbitration and award, failed, neglected and refused to in any way participate therein.

30. That due demand for the payment of said award and their respective proportions thereof, was made upon the defendants and each of said defendants, more than sixty days before commencement of this action, but said defendants and each of them, did fail, neglect and refuse to pay the same or any part thereof.

31. That The Insured, prior to the commencement of this action, for a good and valuable consideration, assigned, transferred and set over to the plaintiffs all its right, title and interest in and to its said fire loss hereinbefore referred to, and in and to its chose in action against said defendants and each of them, by reason thereof, and said plaintiffs, thereupon, became and, at the commencement of this action were and now are the owners and holders of said loss and chose in action, and entitled to sue thereon.

32. That The Insured and the plaintiffs have performed all of the conditions and done all of the acts required to be done by them or either of them, by virtue of said policies and each of them.

33. That the amount of the liability of each defendant for such loss and award depends upon the liability of the other defendants and to adjudge the respective liabilities of the defendants it is necessary at the same time to determine

the liability of each, and all of the defendants having denied liability, it was proper for the plaintiffs to join all of the defendants in this action.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, the sum of $49,088.48.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, the sum of $19,250.32.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, the sum of $8,662.66.

CONCLUSIONS OF LAW.

As conclusions of law, the court finds:

1. That the plaintiffs are entitled to judgment against the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, in the sum of $49,088.48.

2. That the plaintiffs are entitled to judgment against the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, in the sum of $19,250.32.

3. That the plaintiffs are entitled to judgment against the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, in the sum of $8,662.66.

4. That the plaintiffs are entitled to judgment against the defendants for the costs and disbursements of this action, to be taxed and allowed in accordance with the laws of the State of Minnesota.

Let judgment be entered accordingly, after a stay of ten days from the filing of these findings.

December 5, 1929.

By the Court,

BERT FESLER,

Judge.

(Title of Cause.)

NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

To the above named plaintiffs, The Glidden Company, a corporation; Marshall Wells Company, a corporation; Bank of Commerce and Savings, Inc., of Duluth, Minnesota, a Minnesota state banking corporation, and Joseph Supornick; and to Messrs. Kerr, Nelson, Burns & Mohan, and Messrs. Fryberger, Fulton & Boyle, their attorneys:

Take notice, that the above named defendants, and each thereof, will severally move the above named court at a special term thereof to be held in the court house in the city of Duluth, Minnesota, on Saturday, January 18th, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, for judgment in favor of each of said defendants, notwithstanding the verdict heretofore rendered herein, upon the following grounds:

1. That the verdict is not justified by the evidence.

2. That the verdict is contrary to law.

3. That the trial court erred in denying the motions of defendants, severally, for a directed verdict.

4. That the trial court erred in granting plaintiffs' motion for a directed verdict.

Said motion will be based upon the settled case herein and

all of the files, records and proceedings herein.

Dated January 9th, 1930.

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for Defendants.

(Title of Cause.)

ORDER.

The above entitled matter came duly on for hearing before the undersigned, one of the judges of the above named court, at a special term thereof, held on Saturday, January 18th, 1930, upon the motion of each of the above named defendants for judgment notwithstanding the verdict heretofore entered in said action; Messrs. Nathan H. Chase and M. H. Boutelle appearing for defendants in support of said motion, and Messrs. Fryberger, Fulton & Boyle appearing for plaintiffs in opposition thereto.

Having given said motion due consideration,

It is hereby ordered, that said motion be, and the same hereby is, denied, as to each and all of said defendants.

Dated January 18th, 1930.

By the Court,
BERT FESLER,
District Judge.

(Title of Cause.)

NOTICE OF TAXATION OF COSTS AND BILL OF COSTS AND DISBURSEMENTS.

Amount allowed in findings against the defendant,
The Retail Hardware Mutual Fire Insurance
Company of Minnesota $10,085.48
Interest on same, from December 5th, 1929 at
6% 400.90

Amount allowed in findings against the defendant, Implement Mutual Fire Insurance Company of Minnesota	[illegible]
Interest on same from December 5th, 1929 at 6%	157.2[illegible]
Amount allowed in findings against the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin	8,062.[illegible]
Interest on same from December 5th, 1929 at 6%	70.75
	$77,630.[illegible]

Plaintiffs' Costs and Disbursements.

Clerk's fees, to be taxed	4.00
Statutory Costs	10.00
Seven (7) Affidavits	1.75
Sheriff's fees	2.00
Commissioner of Insurance fees	4.00

Witness fees, viz.,

Names Residence	No. days Attendance	Dates of Attendance	No. Miles Traveled	
Thomas M. McCabe, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
John Siegel, Duluth,	1	Dec. 2, 1929,	2	1.2[illegible]
Joseph Siegel, Duluth	1	Dec. 2, 1929,	2	1.2[illegible]
J. E. Markle, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
H. A. Sedgwick, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
J. N. Lindeke, Duluth,	1	Dec. 2, 1929,	4	1.[illegible]

Albin Letour, Colbeyville,	1	Dec. 2, 1929,	15	1.90
Fred Lindbeck, Saginaw,	2	Dec. 2, 3, 1929,	50	5.00

The above Bill of Costs and Disbursements taxed and allowed at.....$ 36.09

Total Amount.....$77,666.41

Dated January 24th, 1930.

J. P. JOHNSON,
Clerk of District Court.

NOTICE OF TAXATION OF COSTS.

Please take notice, that on the 24th day of January, A. D. 1930, at 10:00 o'clock A. M., application will be made to J. P. Johnson, Esq., clerk of the above named court, at his office in the court house, in the city of Duluth, in the county of St. Louis and state of Minnesota, to have the foregoing bill of costs and disbursements taxed and inserted in the judgment then and thereto be entered therein.

Dated January 18th, 1930.

Yours respectfully,
KERR, NELSON, BURNS & MOHAN,
FRYBERGER, FULTON & BOYLE,
Attorneys for Plaintiffs.

To the above named defendants, and to Messrs. Nathan H. Chase and M. H. Boutelle, attorneys for defendants.

(Title of Cause.)

JUDGMENT.

The above entitled action, being regularly upon the calendar of the above named court for the November, A. D. 1929, general term thereof, came duly on for trial before the court and a jury at the court house in the city of Duluth, Minnesota, on the 2nd day of December, A. D. 1929, the plaintiffs appearing by their attorneys, Kerr, Nelson, Burns & Mohan, of St. Paul, Minnesota, and Fryberger, Fulton & Boyle, of Duluth, Minnesota, and the defendants appearing by their attorneys, Nathan H. Chase and M. H. Boutelle, of Minneapolis, Minnesota.

The court had, prior to the date of said trial, to-wit: On September 9th, 1929, made and filed herein an order as follows, to-wit:

"That all issues made by the pleadings in said action be tried to a jury, with the exception of the issue as to the amount of liability of each of the defendants and as to such issue the court will determine the amount of liability, if any, of each defendant, such question being one of computation or mathematics."

At the close of the testimony in said action, the jury, under the direction of the court, returned a verdict in favor of the plaintiffs and against the defendants for the sum of $77,001.46.

The court having heard the evidence adduced at said trial and being fully advised in the premises and upon the verdict of the jury and all of the files and records herein, did, thereafter, to-wit: On December 5th, A. D. 1929, make and file herein findings of fact, conclusions of law and order for judgment. Now, therefore, pursuant to said findings of fact, conclusions of law and order for judgment, and on motion

of the attorneys for the plaintiffs, it is adjudged and de-
232 creed:

1. That the plaintiffs recover of and from the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, the sum of $49,512.38.

2. That the plaintiffs recover of and from the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, the sum of $19,416.56.

3. That the plaintiffs recover of and from the defendant, The Hardware Dealers Mutual Fire Insurance Company of
233 Wisconsin, the sum of $8,737.47.

Witness the Hon. Bert Fesler, judge of the District Court, aforesaid, at Duluth, Minnesota, this 24th day of January, A. D. 1930.

J. P. JOHNSON,
Clerk of District Court.
By B. G. RILLING,
Deputy Clerk.

(Filed and docketed on January 24th, 1930.)

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234 (Title of Cause.)

NOTICE OF APPEAL TO SUPREME COURT.

To Messrs. Kerr, Nelson, Burns & Mohan; Messrs. Fryberger, Fulton & Boyle, and to J. P. Johnson, Esq., clerk of said District Court:

Please take notice, that the above named defendant, Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appeals to the Supreme Court of the state of Minnesota, from the judgment of the said District Court entered herein, on the 24th day of January, A. D. 1930, and from the whole thereof.

Dated this 24th day of January, 1930.

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for Defendant
Hardware Dealers Mutual Fire
Insurance Company of Wisconsin.

Due service of the within notice of appeal is hereby admitted this 24th day of January, 1930.

KERR, NELSON, BURNS & MOHAN,
FRYBERGER, FULTON & BOYLE,
Attorneys for Plaintiffs.
J. P. JOHNSON,
Clerk of District Court.

(Similar notice served by each of the other two defendants.)

(Title of Cause.)

UNDERTAKING ON APPEAL.

Whereas, Hardware Dealers Mutual Fire Insurance Company of Wisconsin, one of the defendants in the above entitled action, appeals to the Supreme Court of Minnesota, from the judgment made and entered therein on January 24th, 1930;

Now, therefore, American Surety Company of New York does undertake, promise and agree to and with each and all of the above named plaintiffs, respondents on said appeal, that said Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant, shall pay the amount directed to be paid by said judgment, or the part thereof as to which it is affirmed, if it is affirmed only in part, and all damages awarded against appellant upon said appeal.

Conditioned, however, that the liability of said American

Surety Company of New York shall not exceed the sum of
238 $10,600.00.

Dated January 25th, 1930.

AMERICAN SURETY COMPANY OF NEW YORK,
By J. G. LEWIS,
Resident Vice-President.

Attest:
R. O. PETERSON,
Resident Asst. Sec. at Minneapolis.

(Seal)

Witnessed by:
H. S. LINDAHL,
239 O. SOLBERG.

State of Minnesota,
ss.
County of Hennepin.

On this 25th day of January, A. D. 1930, before me personally appeared J. G. Lewis and R. O. Peterson, to me personally known, who, being by me each duly sworn, did say on oath: That they are the resident vice-president and the resident assistant secretary, respectively, of the American Surety Company of New York, the corporation described in
240 and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said J. G. Lewis and said R. O. Peterson, each acknowledged the said instrument to be the free act and deed of said corporation.

G. M. KLABO,
Notary Public,
Hennepin County, Minn.

(Seal)

My commission expires April 24, 1931.

Bond and surety approved this 27th day of January, 1930.

E. J. KENNY,
District Judge.

(Similar undertaking given for $59,900.00 by defendant The Retail Hardware Mutual Fire Ins. Co. of Minnesota, and for $23,500.00 by defendant Minnesota Implement Mutual Fire Ins. Co. of Minnesota.)

Nos. 27939, 27940, 27941.

SUPREME COURT OF MINNESOTA.

1930.

THE GLIDDEN COMPANY, a Corporation; MARSHALL WELLS COMPANY, a Corporation; BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, a Minnesota State Banking Corporation, and JOSEPH SUPORNICK, Plaintiffs,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, MINNESOTA IMPLEMENT MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, and THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, All Corporations, Defendants.

STIPULATION.

Whereas, in the above entitled action, separate answers were made and interposed by each of the above named defendants and separate replies were made to such separate answers; and

Whereas, as shown by the record herein, separate judg-

ments were entered against each of said defendants, and separate appeals and undertakings on appeal were taken and given by each of said defendants from the judgment so rendered against each, respectively, and

Whereas, the issues involved in the above entitled action are in all respects identical as to each of said defendants,

Now, therefore, for the purpose of avoiding unnecessary expense in the preparation of the record on appeal herein, including any appeal that may be taken herein by either party hereto to the Supreme Court of the United States, from the decision and judgment of the Supreme Court of Minnesota,

It is hereby stipulated and agreed by and between the respective parties to the above entitled action that the above named defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, shall actively prosecute the appeal so taken by it as aforesaid; and that the printed record on appeal herein—and upon any subsequent appeal to the Supreme Court of the United States—shall and may contain only such pleadings (including entry of judgment, notice of appeal, undertaking, etc.) as concerns said last above named defendant; and that the other two defendants, viz., Retail Hardware Mutual Fire Insurance Company of Minneapolis, and Minnesota Implement Mutual Fire Insurance Company of Minnesota, and each thereof, shall and will in all things abide the final determination and result of said appeal of said The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, including any appeal that may be taken by any of the parties hereto to said Supreme Court of the United States.

If the defendants, or any of them, appeal from the judgment of the Minnesota Supreme Court, they or it shall furnish a supersedeas bond or undertaking on appeal with the

American Surety Company of [illegible]
amount adequate to cover liability of [illegible]

Dated February 6, 1930.

KERR, MELROY, [illegible]
FRYBERGER, FULTON & BOUTELLE,
Attorneys for [illegible]

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for [illegible]

The undersigned, American Surety Company of New York, who is the surety upon three certain undertakings on appeal all dated January 25, 1930, and covering separate appeals by each of the defendants in the above entitled action, hereby joins in, consents to and agrees to be bound by the above stipulation.

AMERICAN SURETY COMPANY OF NEW YORK.

By J. G. LEWIS,
Resident Vice-President.

Attest:

(Corporate Seal) R. O. PETERSON,
Resident Asst. Secretary at Minneapolis,
Minnesota.

Witnesses:

B. BOLAND,
H. S. LINDAHL.

[File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

THE GLIDDEN COMPANY et al., Respondents,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE CO. OF MINNESOTA et al., Appellants

No. 196. 27939-40-41

St. Louis County, Dibell, J.

Syllabus.

1. The business of fire insurance is affected with a public interest and is subject to control and regulation by the state.

2. The provision in the Minnesota standard policy for arbitration or appraisal in case of disagreement as to loss is not violative of Art. 1, §§ 4 and 7 of the state constitution or of the Fourteenth Amendment of the Federal Constitution.

3. Though the arbitration is conducted somewhat after the fashion of a common law arbitration as distinguished from our statutory arbitration the standard policy arbitration or appraisal is not revocable but is a method fixed by statute for finding loss in the event of disagreement and is binding upon insurer and insured.

Judgment affirmed.

OPINION—Filed Nov. 28, 1930

DIBELL, J.:

Action on an award or appraisal made pursuant to policies of fire insurance issued by the defendant insurance companies. A verdict for something over $77,000 was directed for the plaintiffs by the court. It was apportioned by the court's findings, $29,088.48 against the defendant Retail

Hardware Mutual Fire Insurance Company of Minnesota; $19,250.32 against the defendant Minnesota Implement Mutual Fire Insurance Company; and $8,662.66 against the defendant Hardware Dealers Mutual Fire Insurance Company of Wisconsin. The defendants appeal and present for review the judgment in the latter amount, agreeing to abide the result in the others.

The defendants claim that the compulsory appraisal provision of our standard policy, applicable in the event of the parties disagreeing as to the amount of the loss, G. S. 1923, § 3512, is violative of art. 1, §§ 4 and 7 of the state constitution, and of the Fourteenth Amendment.

It is conceded substantially that the recent case of Itasca Paper Company v. Niagara Fire Ins. Co. 175 Minn. 73, 220 N. W. 425, if applied controls. The defendants urge that certain late federal cases have changed the doctrine there approved. They ask a reconsideration of the questions involved with the purpose, if unsuccessful here, of having a review in the court of final authority. After a thorough reconsideration we follow the Itasca case. An extended further discussion is not necessary.

1. The business of fire insurance is affected with a public interest. Northwestern National Life Ins. Co. v. Riggs, 203 U. S. 243; German Alliance Ins. Co. v. Lewis, 233 U. S. 389; National Fire Ins. Co. v. Wanberg, 260 U. S. 71; Abramowitz v. Continental Ins. Co. 170 Minn. 215, 212 N. W. 449; Itasca Paper Co. v. Niagara Fire Ins. Co. 175 Minn. 73, 220 N. W. 425, and cases cited. Within reasonable limits the state may regulate the insurance business, and prescribe the conditions under which policies may be written and insurance business done. Its control must be reasonable.

In Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, which involved a Kentucky policy, the parties in their desire for arbitration stood in a position directly opposed to that of the parties here. The insurance company wanted arbitration. The insured refused to participate and brought an action on the policy. A verdict was directed for the insurance company. In directing the verdict the theory of the trial court was that the defendant insurance company had the right to an arbitration of the amount of the

loss. The report states "that the court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff in writing to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do, and instructed the jury to return a verdict for the defendant, which was accordingly rendered". The plaintiff brought error and the Supreme Court disposed of the question in this language:

"The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; * * * The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

This case seems sufficient authority. The defendants cite the following cases claiming that they change the rule: Terral v. Burke Construction Co. 257 U. S. 529 (statute invalid providing for revocation of license of foreign corportation because while doing domestic business in state it resorted to federal court); Coppage v. Kansas, 236 U. S. 1 (statute invalid making it a misdemeanor for employer to require employe to agree not to become or remain member of labor organization during his employment); Frost v. Railroad Commission, 271 U. S. 583 (statute invalid requiring user of highway by private carrier for hire to assume burdens and duties of common carrier); Hanover

Fire Ins. Co. v. Harding, 272 U. S. 494 (statute invalid requiring foreign corporation to submit to various conditions or waive constitutional rights—contract); Tyson v. United Theatre, etc. 273 U. S. 418 (statute invalid regulating sale of theatre tickets). We find in none of them a suggestion that the rule of Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, is not the correct one. In the Terral case it is noted that the decisions are not all in harmony and that that case necessarily overrules Doyle v. Continental Ins. Co. 94 U. S. 535, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246. But we see no substantial reason for holding that the basis of the rule of the Hamilton case is affected.

2. The claim is then made that the arbitration provision if compulsory ousts the jurisdiction of the court and therefore is invalid. This is not the view we take. Liability is not fixed by means of an appraisal. There is only a finding of the loss. See Abramowitz v. Continental Ins. Co. 170 Minn. 215, 212 N. W. 449, and cases cited. Liability is left for judicial determination. The right of appraisal is as well for the insured as insurer, it does not determine liability but only the amount of the loss, and the statute is constitutional. An award may be so grossly excessive or inadequate as to be subject to vacation as for fraud though there be no actual fraud, and it may be vacated for actual fraud, for in either of such cases there is a judicial determination of liability. Herrington v. Agr. Ins. Co. 179 Minn. 510, 229 N. W. 792.

We quote again from Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, referring to a provision for arbitration:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

The whole law is tersely stated at sufficient length, with a citation of the controlling authorities, in Vance on Insurance (2 ed.) 764:

"It is well settled that a clause intended to refer to arbitration the whole question of the insurer's liability under the contract is void, as ousting the jurisdiction of the court. If the matter referred is merely the amount of that liability, the condition is perfectly valid and will be enforced."

And we note in Red Cross Line Co. v. Atlantic Fruit Co. 264 U. S. 109, a reference to the validity of a general executory agreement for arbitration "where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnish essential evidence of specific facts, and makes it a condition precedent to the cause of action."

And see Orient Ins. Co. v. Skellett Co. 28 F. (2d) 968; Continental Ins. Co. v. Titcomb, 7 F. (2d) 833; Hamberg v. St. Paul, etc, Ins. Co. 68 Minn. 335, 71 N. W. 388; Mosness v. German-American Ins. Co. 50 Minn. 341, 52 N. W. 932; Gasser v. Sun Fire Office, 42 Minn. 315, 47 L. R. A. (N. S.) 337.

3. We have referred often to the policy arbitration or appraisal as in the nature of a common law arbitration. It is so in contradistinction from our statutory arbitration. The companies claim that an agreement for a common law arbitration is revocable, and therefore the policy provision is revocable, and they claim that by refusing to participate they revoked. This does not follow. It was never the intent of the statute that the arbitration was other than compulsory. If revocable there would be no actual or effective appraisal within the contemplation of the policy. It was the thought of the legislature that dealing with business affected with a public interest it would provide for the ascertainment of loss, not liability, by a so-called arbitration for which it prescribed, and that the policy upon this point was not an executory agreement. It did not provide something that either party through whim or caprice might disregard. And what it made was a definite procedure binding upon both parties in ascertaining loss.

Judgment affirmed.

IN SUPREME COURT OF MINNESOTA

27939-40-41

THE GLIDDEN COMPANY, a Corporation, et al., Respondents,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, et al., Appellants

JUDGMENT—Filed Dec. 9, 1930

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of St. Louis, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents herein, do have and recover of appellants, herein the sum and amount of thirty-five and 25/100 dollars ($35.25), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Dec. 9th, 1930, A. D. 193-.

By the Court.

Attest:

Grace Kaercher Davis, Clerk. (Seal of the Supreme Court, State of Minnesota.)

Statement for Judgment

Statutory Costs, $25.00; Printer, $10.00; Clerk, $—; Acknowledgments, $.25; Return, $—; Postage and express, $—; Filing Mandate, $—; Transcript, $—; Appeal Bond, $—; Total, $35.25.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

IN SUPREME COURT OF MINNESOTA

No. 27941

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA TO THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice of the Supreme Court of the State of Minnesota:

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, a corporation of Wisconsin, respectfully shows:

1. Petitioner is the appellant in the above entitled cause;

2. The appeal in said cause was from a judgment for the recovery of money rendered in a civil action on the 24th day of January, A. D., 1930, by the District Court of the County of St. Louis, Eleventh Judicial District of the State of Minnesota against petitioner and in favor of the above named respondents;

3. That on appeal from such judgment by petitioner to the said Supreme Court of the State of Minnesota, such court being the highest court of law and equity in said state in which a decision of the matters in controversy could be had, the judgment appealed from was in all respects affirmed by the final judgment entered in the said Supreme Court on the — day of December, A. D. 1930;

4. That there is error in the final judgment and the record of proceedings in this cause in the said Supreme Court of the State of Minnesota, whereby petitioner is aggrieved in that in the decision and judgment of said Court, there was drawn in question the validity of a statute of the State of Minnesota, namely, Chapter 410 of the General Laws of Minnesota of 1913, on the ground of its being repugnant to and in contravention of the Fourteenth Amendment of the Constitution of the United States and that the

decision and judgment of said Court was in favor of the validity of such statute;

5. That contemporaneously with the aforesaid appeal of petitioner, appeals to the said Supreme Court of the State of Minnesota were regularly perfected by respectively The Retail Mutual Fire Insurance Company of Minnesota and Minnesota Implement Mutual Fire Insurance Company of Minnesota, from separate judgments rendered by the aforesaid District Court of St. Louis County, Minnesota, in favor of the above named respondents and against said last named appellants in the same cause as that in which judgment was rendered against petitioner; that it was stipulated of record between all of the parties to the cause last aforesaid and the several judgments therein rendered, that the appeals in the Supreme Court of the State of Minnesota should be heard and determined in the case of petitioner and that the final judgments on the other appeals hereinabove indicated should abide the event; that it was further provided by such stipulation that if an appeal were taken from the final judgment rendered on such appeals by the Supreme Court of the State of Minnesota to the Supreme Court of the United States, such appeal might be had or taken by either of said several appellants and from either of the judgments so rendered by the Supreme Court of the State of Minnesota and that the judgments rendered against the others of said appellants should similarly abide the event of the appeal to the Supreme Court of the United States on condition that the appellant in such appeal to the Supreme Court of the United States should furnish a supersedeas bond or undertaking in an amount adequate to cover the liability of each of said several appellants as ascertained and adjudicated by the Supreme Court of the State of Minnesota;

Wherefore Petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Minnesota against petitioner to the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of the State of Minnesota may be examined and reversed and further prays that a transcript of the record, proceedings and papers in

this cause, duly authenticated by the clerk of the Supreme Court of the State of Minnesota, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner further prays that the appeal herein may be a supersedeas; that the Court may, by appropriate order, fix the security required in accordance with the foregoing stipulation; that on approval of such security, such appeal may be allowed as a supersedeas with respect to all said several judgments and that the court reserve jurisdiction with respect to all such judgments to revise the same in accordance with the judgment and mandate of the Supreme Court of the United States in the appeal hereby prayed.

The errors upon which petitioner claims to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the Assignments of Errors filed herewith.

Dated December 17, 1930.

Nathan H. Chase and Mortimer H. Boutelle, Attorneys for Petitioner-Appellant, Minneapolis, Minnesota.

IN SUPREME COURT OF MINNESOTA

No. 27941

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 24, 1930.

The Petition of The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant in the above entitled matter, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of Minnesota and the Assignment of Errors filed therewith and the record of said cause having been considered:

It is ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Minnesota as prayed in said petition and that the Clerk of the Supreme Court of the State of Minnesota shall prepare and certify a transcript of the record and proceedings in the above entitled cause and trans-

mit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is further ordered: That

Whereas, the parties to the above entitled cause and those to the certain other appeals in the Supreme Court of the State of Minnesota, indicated in the Petition for appeal herein, have stipulated that the appeal may be taken in this cause and that the same shall operate as a supersedeas with respect to the judgment herein appealed from as well as such other judgments, conditioned that a bond or undertaking be filed herein, in an amount sufficient to cover all said judgments, including damages and costs as provided by law; that appellant shall file its bond or undertaking in the sum of Ninety Thousand (90,000) Dollars conditioned that it shall prosecute said appeal to effect and if appellant shall fail to make its plea good to answer all damages and costs and further conditioned to pay any amounts ultimately adjudicated by the Supreme Court of the State of Minnesota against such other appellants in the aforesaid petition for appeal mentioned.

The said appellant now presenting an undertaking in the sum of Ninety Thousand (90,000) Dollars, executed by American Surety Company of New York, it is ordered that such undertaking be and the same is hereby approved.

It is further ordered the appeal herein shall operate as a supersedeas.

Dated December 18th, 1930.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

Bond on appeal for $90,000, approved and filed December 24, 1930, omitted in printing.

Citation, in usual form, showing service on Kerr, Nelson, Burns & Mohan et al., filed December 24, 1930, omitted in printing.

IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Dec. 24, 1930

It is hereby stipulated and agreed that the record to be certified to the Supreme Court of the United States from the Supreme Court of the State of Minnesota, on the appeal in the above entitled cause, shall contain the following:

1. Printed record in Supreme Court of Minnesota on appeal from the District Court of St. Louis County.
2. Opinion of the Supreme Court of Minnesota.
3. Judgment of the Supreme Court of Minnesota.
4. Petition for appeal and assignment of errors.
5. Order allowing appeal.
6. Copy of undertaking on appeal.
7. Citation.

Serving of præcipe hereby waived.

Kerr, Nelson, Burns & Mohan and Fryberger, Fulton & Boyle, Attorneys for Respondents. Nathan H. Chase and M. H. Boutelle, Attorneys for Appellant.

Dated December 18th, 1930.

Clerk's certificates omitted in printing.

SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND STIPULATION TO PRINT ENTIRE RECORD—Filed Feb. 16, 1931

The single point intended to be urged and relied on by appellant on the appeal in the above entitled cause is the constitutionality of so much and that part of the General Laws of the State of Minnesota, 1913, ch. 421 (Mason's Minnesota Statutes 1927, sec. 3512) as prescribes compulsory arbitration or appraisal of the amount of loss and damage sustained by the subject-matter of insurance covered or insured against loss or damage by fire under the required Standard Form of fire insurance policy prescribed by the laws of that State.

The present appeal is taken from a final judgment rendered by the Supreme Court of the State of Minnesota, the highest court in that state in which a decision could be had, against appellant. The single question raised on such appeal was the constitutionality of the above mentioned statute. Such statute was challenged on said appeal as repugnant to the Constitution of the United States and more particularly to the Fourteenth Amendment, as denying (1) due process of law, (2) the equal protection of the law, and (3) the liberty of contract.

The Supreme Court of the State of Minnesota by its decision and judgment, held that the statute in question was valid and not in contravention of the Federal Constitution.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Appellant. Nathan H. Chase, Mortimer H. Boutelle, Counsel for Appellant, Minneapolis, Minnesota.

STIPULATION FOR PRINTING RECORD

It is stipulated between the parties to the above entitled cause, that the record to be printed by the Clerk of the Supreme Court of the United States in said cause, shall comprise and include the entire record as transmitted to the above entitled Court from the Supreme Court of the State of Minnesota.

Dated February 11, 1931.

Nathan H. Chase, Mortimer H. Boutelle, Counsel for Appellant. Kerr, Nelson, O'Neill, Mahon & Dudley, Fryberger, Fulton & Boyle, Counsel for Appellees.

[File endorsement omitted.]

Endorsed on cover: File No. 35,587. Minnesota Supreme Court. Term No. 665. The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant, vs. The Glidden Company, Marshall Wells Company, Bank of Commerce and Savings, Inc., of Duluth, Minnesota, etc., et al. Filed January 17, 1931. File No. 35,587.